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October 5, 2005

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Federal Communications Commission
Office of the Secretary
445 - 12th Street, SW
Washington, DC 20554

Re: CC Docket No. 02-6; Request for Review; Appeal of Novell, Inc. of
September 6, 2005 Decision of The Schools and Libraries Division

Dear Sir:

This firm is counsel to Novell, Inc. ("Novell").

This letter is an appeal to the Federal Communications Commission ("FCC") of the September 6, 2005 Decision of the Schools and Library Division ("SLD") of the Universal Service Administrative Company ("USAC") which classified Novell's Software License Agreement ("SLA") program for K-12 schools as one for "internal connections," rather than "basic maintenance services." A copy of the SLD's decision is attached as Exhibit 1. As a result of this improper classification, federal funds for the program are limited by the FCC's "twice every five years" rule. As discussed below, the fees associated with Novell's SLA program fees are predominantly for annual upgrade protection and do not represent a capital expenditure by any school district. Accordingly, Novell respectfully requests that the FCC re-classify Novell's SLA program as basic maintenance services and, thus, exempt from the FCC's "two years out of five years" rule. In the alternative, Novell requests that the FCC amend the definition of "internal connections" to allow SLD to categorize items that are not capital expenditures as basic maintenance.

PROCEDURAL INFORMATION

In accordance with the USAC Appeals Procedure, the following information is provided. The contact information for the person that can most readily discuss this appeal with you is David Lewis, Associate General Counsel, Novell, Inc., 1800 S. Novell Place, Provo, UT 84606, telephone number 801-861-6905, e-mail dclewis@novell.com. This letter is an appeal of the SLD decision dated September 6, 2005 and relates to fiscal year 2005. The Billed Entity Name is Novell, Inc., and the Service Provider

Identification Number is 143004863. A copy of the language or text from the decision that is at the heart of the appeal is as follows:

You have asked about how the funding of software licenses is impacted by the FCC's two-out-of-five rule, which restricts the ability of a school or library location from receiving funding for Internal Connections to no more than every two out of five years. In brief, regardless of the license term for the eligible software – whether it is one year, three years, five years, or in perpetuity – we will provide Internal Connections funding to any one location to no more than every two out of five years. For example, if the term of a software license is one year, we would be able to provide support for the license no more than every two out of five years. If the term of a software license is ten years, or three years, or any other length of time, or in perpetuity, we can provide support for the payment of the software license to no more than every two out of five years for any specific school or library location.

You have submitted information that, in effect, indicates that Novell's SLA licensing plan is disadvantaged by the two-out-of-five year rule. Since Novell's SLA license is issued for one year at a time, you indicate that applicants may only receive support for the license every two out of five years. Because we administer policy as set by the FCC, and do not ourselves set the policy for the E-rate program, we are unable to provide an accommodation that goes outside of the authority granted to us. As we discussed, the FCC could conceivably modify its rules in the future, and/or Novell could modify its licensing term to provide a longer license period than a single year. I would like to be helpful, but at this time I'm not aware of other options.

(SLD Decision dated September 6, 2005). An authorized signature on this letter of appeal is provided below.

BASIS FOR APPEAL

Novell hereby appeals the determination of the SLD to classify Novell's SLA Program as one for internal connections, rather than basic maintenance services. This incorrect classification substantially prejudices Novell because many of Novell's K-12 customers recently became subject to the FCC's "two out of five years" rule. The funding limitations of this rule became effective to Novell when the fiscal year 2005 year commenced on July 1, 2005.¹ The FCC rule prevents eligible entities from receiving e-Rate funding for "internal connections" for more than two years during a five-year period. Basic maintenance services are exempt from the rule.

¹ Novell timely appealed the adverse affect of the FCC rule to SLD by letter dated August 29, 2005. Exhibit 2. This appeal of the SLD's September 6, 2005 decision is timely filed within 60 days after the date of that decision.

Novell's SLA is a subscription-based program for K-12 schools. Since maintenance service is the primary benefit of the program and the SLA fees do not represent any type of capital expense, the program properly should be classified as maintenance services, and not a program for "internal connections." Novell's SLA program for K-12 schools do not involve the type of capital expenditures (like new or replacement equipment) the FCC rule was designed to discourage.

Novell's SLA program requires contracting schools to pay an annual "SLA License Fee," which is allocated to provide upgrade protection services (the availability of software upgrades and updates/bug-fixes), as well as an incidental amount for renting the software. There is no upfront license fee included, nor is any perpetual license right acquired by the K-12 schools. Rather, SLA customers receive only a time-limited right to use the software, and annual upgrade protection services, during the term of the SLA agreement. Upon payment of the SLA fees, a customer is given the option of receiving a small credit toward the purchase of perpetual license rights (similar to a car lease with an option to buy). The SLA program, however, does not grant any substantive perpetual license rights to K-12 customers.

Novell's SLA program mostly closely resembles "maintenance," as that term is defined by the FCC:

Basic maintenance services are "necessary" if, but for the maintenance at issue, the connection would not function and serve its intended purpose with the degree of reliability ordinarily provided in the marketplace to entities receiving such services without e-rate discounts. Basic maintenance services do not include services that maintain equipment that is not supported or that enhance the utility of equipment beyond the transport of information, or diagnostic services in excess of those necessary to maintain the equipment's ability to transport information.

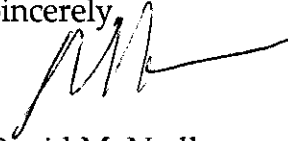
FCC Order 03-323 at paragraph 23.

As the SLA agreement states, upgrade protection services are included in the SLA License Fees. Given the inclusion of upgrade protection services in Novell's SLA program, it is clear that the SLA Program is upgrade protection/maintenance services. Indeed, the need for a school district to receive patches, bug-fixes and software upgrades on an annual basis was recognized in paragraph 20 of the FCC's order: "Proper maintenance of internal connections products ensures that equipment functions properly, thereby limiting uneconomical replacement of equipment. We therefore continue to allow applicants to apply for discounts for maintenance of equipment each finding year." Since Novell's SLA program fees are predominantly for annual upgrade protection, with time-limited, subscription-based usage rights incidental thereto, they properly should be classified as "basic maintenance services" and, thus, exempt from the FCC's "two years out of five years" rule.

FCC – Office of the Secretary
October 5, 2005
Page 4

Accordingly, for the reasons stated herein, Novell respectfully requests that the FCC grant this appeal and re-classify the SLA program fees as basic maintenance services that are exempt from the "two years out of five years" rule.

Sincerely,

A handwritten signature in black ink, appearing to be 'DMN' followed by a long horizontal stroke.

David M. Nadler

Enclosures

From: Philip Gieseler [pgieseler@universalservice.org]
Sent: Tuesday, September 06, 2005 2:51 PM
To: dclewis@novell.com; dbrower@novell.com
Subject: E-rate eligibility for software licenses

As we discussed by phone today, the E-rate program can support purchases of software licenses for network operating systems and e-mail. The software license gives eligible schools and libraries the right to use a software product for a certain period of time (or, often, in perpetuity). The software license also often provides some upgrade protection and technical support for a period of time.

You have asked about how the funding of software licenses is impacted by the FCC's two-out-of-five rule, which restricts the ability of a school or library location from receiving funding for Internal Connections to no more than every two out of five years. In brief, regardless of the license term for the eligible software—whether it is one year, three years, five years, or in perpetuity—we will provide Internal Connections funding to any one location to no more than every two out of five years. For example, if the term of a software license is one year, we would be able to provide support for the license no more than every two out of five years. If the term of a software license is ten years, or three years, or any other length of time, or in perpetuity, we can provide support for the payment of the software license to no more than every two out of five years for any specific school or library location.

You have submitted information that, in effect, indicates that Novell's SLA licensing plan is disadvantaged by the two-out-of-five year rule. Since Novell's SLA license is issued for one year at a time, you indicate that applicants may only receive support for the license every two out of five years. Because we administer policy as set by the FCC, and do not ourselves set the policy for the E-rate program, we are unable to provide an accommodation that goes outside of the authority granted to us. As we discussed, the FCC could conceivably modify its rules in the future, and/or Novell could modify its licensing term to provide a longer license period than a single year. I would like to be helpful, but at this time I'm not aware of other options.

I also mentioned the Eligible Products Database to you. Information about this program is available at http://www.sl.universalservice.org/vendor/epd_pilot/.



August 29, 2005

VIA FACSIMILE TRANSMISSION AND CERTIFIED MAIL (973) 599-6545

Lathaniel (Nate) Fearrington
Technology Services
Schools and Libraries Division
100 S. Jefferson Rd
Whippany, NJ 07981

**Re: Misclassification of Novell's School License Agreement
("SLA") program as "internal connections" rather than
"maintenance"**

Dear Mr. Fearrington:

I am an attorney with Novell and was recently asked David Brower (Novell North America Education Market Manager) to follow up on an e-rate eligibility determination by SLD. As a leading software company providing networking/infrastructure software, Novell (through its K-12 customers) recently became subject to the FCC's "two out of five years" rule ("FCC Rule"). As you're aware, the rule prevents eligible entities from receiving e-Rate funding for "internal connections" for more than two years during a five-year period. Basic maintenance services are exempt from this rule.

Novell has operated a subscription-based program for K-12 schools (SLA program) for many years. Because maintenance services are the primary benefit of the SLA program, and because SLA fees do not represent any type of capital expense, Novell believes the SLD mistakenly classified the SLA Program as one involving "internal connections" rather than maintenance services. Only recently, with the beginning of the 2005 Funding Year on July 1, 2005, did this mistaken classification prejudice Novell as a service provider because of the federal funding limitations the FCC Rule places on needy school districts.

Novell's School License Agreement Program

A simple examination of Novell's SLA Program leaves no doubt that K-12 schools do not involve the type of capital expenditures (like new or replacement equipment) the FCC Rule was designed to discourage. Novell's SLA Program requires contracting schools to pay an annual "SLA License Fee," which is allocated to providing upgrade protection services (the availability of software upgrades and updates/bug-fixes), as well as an incidental amount for renting the software. There is no upfront license fee included, nor are any substantial perpetual license rights acquired by the K-12 schools. Rather, SLA customers receive only a time-limited right to use the software, and annual upgrade protection services, during the term of the 3-year SLA agreement. Upon

payment of the SLA annual fee, a customer is given a small credit toward the purchase of perpetual license rights (similar to a car lease with an option to buy), but the SLA Program itself does not grant any substantive perpetual license rights to K-12 customers. *See generally* <http://www.novell.com/customers/education/edsales/purchase.html>.

Compared to the wasteful practice of some school districts in using limited federal funds to purchase new hardware and other networking equipment annually,¹ Novell's SLA Program mostly closely resembles "maintenance," as that term is defined by the FCC:

Basic maintenance services are "necessary" if, but for the maintenance at issue, the connection would not function and serve its intended purpose with the degree of reliability ordinarily provided in the marketplace to entities receiving such services without e-rate discounts. Basic maintenance services do not include services that maintain equipment that is not supported or that enhance the utility of equipment beyond the transport of information, or diagnostic services in excess of those necessary to maintain the equipment's ability to transport information. [FCC Order 03-323 at para. 23]

As the SLA agreement states, upgrade protection services are included in the SLA License Fees; given the inclusion of upgrade protection services in Novell's SLA Program and the reality that SLA fees are less expensive than upgrade protection fees, it is difficult if not impossible to conclude that the SLA Program is anything more than upgrade protection/maintenance services.² Because the predominant part of Novell's SLA Program fees are for annual upgrade protection, with time-limited, subscription-based usage rights incidental thereto, Novell respectfully requests the SLD re-classify Novell's SLA Program fees as representing "basic maintenance" services and thus exempt from the FCC's "two years out of five years" rule.

Alternative Purchase of Upgrade Protection

To enable K-12 school districts to qualify for funding, Novell is also considering making upgrade protection part numbers and sku's available to such schools and amending their SLA agreements to require annual upgrade protection instead of "SLA License Fees." Essentially, Novell is proposing to:

- 1 This point was repeatedly emphasized as the rationale for the FCC's Rule: "By limiting each eligible entity's ability to receive support for internal connections, recipients will have greater incentive not to waste program resources by replacing or upgrading equipment on an annual basis." (FCC Order, para. 17)
- 2 The need for a school district to receive patches, bug-fixes and software upgrades on an annual basis was recognized by the FCC in its December 23, 2003 Order: "Proper maintenance of internal connections products ensures that equipment functions properly, thereby limiting uneconomical replacement of equipment. We therefore continue to allow applicants to apply for discounts for maintenance of equipment each funding year." (para. 20)

- allow SLA customers to submit an SLA annual fee worksheet showing what their annual fee would be for the SLA.
- enable SLA customers to use standard Novell education part numbers (50% off Novell MSRP) and purchase upgrade protection for any of the e-Rate eligible products that customers licensed under the SLA in the past.

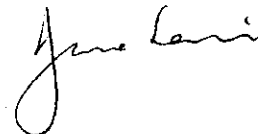
Because purchasing annual upgrade protection by product will be significantly more expensive than the SLA annual fee, Novell would deduct any upgrade protection purchased from the cost of a customer's SLA annual fee (since it would be a duplication of the upgrade protection purchase).

If the cost of the upgrade protection for a customer's installed e-rate eligible products exceeds the annual fee of the SLA, Novell will waive the SLA annual fee and leave the coverage in place. If the upgrade protection does not exceed the SLA annual fee, Novell will have the customer include payment for the difference between the SLA annual fee and the upgrade protection. We do not anticipate that occurring since the SLA annual fee is based on the upgrade protection a customer purchases under the contract. Novell would also request that customer keep a record of what they have installed to ensure accuracy and avoid delays and problems if the customer is audited by the SLD.

Conclusion

To avoid placing K-12 schools in a budget crisis and to classify Novell's SLA Program consistent with the policies reflected in the FCC Rule, Novell requests SLD classify the SLA Program as representing basis maintenance exempt from the "two years out of five years" rule. Please contact me (801) 861-6905 or David Brower (801) 861-7059 as soon as possible if you have any questions about this request.

Respectfully Submitted,



Dave Lewis
Associate General Counsel